SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted].108

DOANE AGRICULTURAL SERVICE, INC.,
Petitioner,

vs.

A. W. COLEMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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No. 1074.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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QUESTIONS PRESENTED.

The question presented by the petitioner is:

Whether, where a Trial Court peremptorily instructs a jury that the master-servant relationship exists, a Court of Appeals is justified in affirming on the sole ground that there was in the record evidence from which the jury could have so found? The question involved is not whether

the jury could have found that Guarr and Mitchell were employees of Doane, but whether the Trial Court was justified in peremptorily instructing the jury that they were, in fact, the agents of Doane (petition for writ of certiorari, pages 2 and 6).

I.

STATEMENT.

References prefixed by the letter "b" are to pages of the Appendix of the Respondent filed in the Court of Appeals. References prefixed by the letters "OP" are to pages of the Opinion of the Court of Appeals in the instant case and found in Appendix to Petition for Certiorari. References prefixed by the letter "R" are to pages of the Joint Appendix of Petitioner and its co-defendant filed in the Court of Appeals in this case.

The pertinent facts found by the Court of Appeals may be summarized as follows:

"* * * and the question presented is, by whom was Guarr employed? There is evidence that he was engaged by Doane, through its independent action, notwithstanding approval by Hughes at a later date. Under the terms of the contract and its practical construction, Doane had exercised his right to hire and fire employees. Doane's contention that Guarr was the employee of Hughes, as a matter of law, must be rejected. So, too, with Mitchell, who as an employee on the farm was retained by Doane, when it took over management of the farm." (Op. p. 3a). "Doane urges upon us a principle stated in some of the Tennessee cases that an agent has no responsibility for the acts of sub-agents and, so, Doane is not liable as a matter of law for the negligence of Guarr and Mitchell, but Guarr was selected by Doane, and Mitchell, originally an em-

ployee or tenant of Hughes, was retained by Doane. There was no obligation on the part of Doane to hire Guarr as farm manager or to keep Mitchell. They were in no sense sub-agents of Hughes. They were employees of Doane and the mere fact that their employment may have been subject to approval by Hughes does not place them in the category of sub-agents." (Op. pp. 5a-6a). "In any event, there is no substantial evidence showing an employment relationship between Hughes on the one hand and Guarr and Mitchell on the other to warrant submission of the question of sub-agency to the jury." (Op. p. 6a). "The District Judge was not in error in concluding that Guarr and Mitchell were employees of Doane." (Op. p. 6a). "Our views are supported by Sec. 362 of the Restatement of the Law of Agency: An agent is liable to third persons for the conduct of sub-agents and of his servants under the same conditions which make a principal liable for the conduct of an agent or servant. In its comment under that section the American Law Institute states: (a) For some purposes a sub-agent is an agent of the principal, since he acts on the principal's account and is subject to his ultimate control in the performance of acts done for him. He is also, however, an agent of the agent and subjects the latter to liability within the sphere of activity in which he is authorized to act, in accordance with the rules dealing with the liability of the principal for the conduct of an agent stated in Secs. 212-219. (b) An agent employing a servant upon the principal's affairs is subject to liability for the conduct of such a servant to the same extent as is any master." (Op. p. 7a).

The above quotations from the opinion of the Court of Appeals show conclusively that said Court did not, as contended by petitioner, affirm the judgment of the District Court on the ground that there was only evidence in

the record from which the jury could have so found. On the contrary, they show that the Court of Appeals found that there was no substantial evidence to warrant submission of this issue to the jury.

The opinion of the Court of Appeals was rendered on April 4, 1958. Petitioner filed a Petition to Rehear on April 19, 1958, and same was denied on May 1, 1958. Petitioner did not file a motion to stay the mandate in order to file a petition for certiorari in this Court as provided in Rule 24 of the Rules of the Court of Appeals, Sixth Circuit, and the mandate of said Court was issued on May 9, 1958, and received by the District Court on May 12, 1958. Petitioner filed a motion to recall and stay the mandate in said Court on May 14, 1958, and on May 15, 1958, withdrew said motion and voluntarily paid one-half of the judgment, interest and costs and the other one-half was paid by its co-defendant, Reynold K. Hughes d/b/a Fayette Stock Farm, despite the fact that no execution had been issued. The District Court entered an order of distribution on May 23, 1958, and the proceeds of the judgment were accordingly dispersed. No further action was taken by petitioner until June 16, 1958, when the petition for certiorari was filed in this Court. We, therefore, submit that only a moot question is presented.

It is interesting to note that petitioner now contends that the question of whether Guarr and Mitchell were employees of Doane or of its co-defendant, Hughes, presented a jury question. As a matter of fact, the first time petitioner made any such contention was in the Court of Appeals. Throughout the trial in the District Court petitioner strongly contended that this was a question of law to be determined by the Court. In its opening statement to the jury petitioner stated "But, regardless of the legal relationship and whose employee was working for who—

His honor will tell you that—" (b. p. 9), and in its argument in support of its motion for a directed verdict in the District Court petitioner stated "Mr. Braden: I want to state the specific grounds of my motion at this time. First, that the undisputed proof—the contract, the written contract in this case that has been introduced does not leave the question for the jury to determine the relationship between the parties." (R. p. 99a); and further, "Now, if Your Honor please, Your Honor is passing—I assume that Your Honor is going to leave to the jury to determine whose employees these people were, when there is a written contract. The evidence is not disputed as to the relationship. Now, this might be a suit between Mr. Hughes and the agency for mismanagement and conduct outside of the contract might be looked to. But here, if Your Honor please, if this case goes to the jury on the relationship, His Honor is passing to that jury a legal question. Now, I say this in all frankness, I say it is a legal question. If, under the facts of this case, that the Doane Agricultural Service is an independent contractor, that we are responsible for every tenant and every person that they employ on these farms that they manage. But Your Honor should act before the jury and let Mr. Hughes out. If that is the law, we ought to know it." And further, "* * * as I said, the contract is here, and we accept every legal obligation that the contract imposes upon us". (R. p. 100a). Thus it will be seen that petitioner was not insisting in the District Court that the matter be left to the jury as a factual issue but was insisting that it was a matter of law to be decided by the Court. The only real complaint of petitioner is that it was decided against him. Petitioner states that it excepted to the action of the District Court in failing and refusing to submit this issue of fact to the jury and that it submitted special requests to that effect. Actually, the special requests referred to

by the petitioner, had they been given, would have amounted to a directed verdict of acquittal for petitioner because the only possible way that petitioner could be held involved in this lawsuit was through the negligent actors, Guarr and Mitchell. The special requests referred to are as follows:

> "Special Instruction No. I Requested by Defendant, Doane Agricultural Service, Inc. Refused—Boyd J.
>
> 'Gentlemen, you are instructed that the defendant, Doane Agricultural Service, Inc., under the undisputed facts in this case, was an agent of the defendant, Reynold K. Hughes and managing and servicing his farm. As such agent, this defendant is not liable for any negligent acts of any sub-agent or employee of the defendant Hughes.'
>
> "Special Instruction No. 2 Requested by Defendant, Doane Agricultural Service, Inc. Refused—Boyd, J.
>
> 'You are instructed that even though you find that the farm manager, Mr. Guarr, or the farm employee, J. Mitchell. were guilty of any acts of negligence which proximately contributed to the plaintiff's injuries, their negligence would not be imputed to the defendant, Doane Agricultural Service, Inc., and you would not be justified in returning a verdict against the defendant, Doane Agricultural Service, Inc., for any act of negligence that you might find in the preponderance of the evidence that was committed by either, Mr. Guarr, the farm manager, or J. Mitchell.'" (R. p. 125a).

At no time, in the District Court, did the petitioner even suggest that the question should be left to the jury but was on the contrary stoutly maintaining that it was a legal question to be decided by the Court. The District

Court refuted petitioner's contention in this regard in no uncertain terms?: "The Court: Well, who is Doane? Doane was Guarr, wasn't he? He was running the farm. Doane was an agency, I take it, which performs this service for numerous people."? "Mr. Braden: Yes, sir, farms anywhere with non-residents." "The Court: You are reading some things into this that are not here. Doane isn't a sub-agent. I mean, Guarr was not a sub-agent. Is that what you are saying, a sub-agent?" (B. pp. 23-24.)

The Court of Appeals affirmed the action of the District Court. "The District Judge was not in error in concluding that Guarr and Mitchell were employees of Doane." (Op. p. 6a).

We, therefore, pose the question, should this Court grant the petition for certiorari and remand the case to the District Court for a re-trial as requested by petitioner herein, is it not logical to conclude that the District Court would again direct a verdict against the contentions of petitioner herein and since the Court of Appeals has already approved this course of action on the part of the District Court, what ultimate benefit could the petitioner obtain? Regardless of the fault petitioner finds with the Court of Appeals' opinion, the fact remains that it unequivocally approved the action of the District Court and there is no apparent reason why a re-trial would result in a different outcome. The Court of Appeals denied the petition to rehear without opinion and we think it is apparent that said Court considered petitioner's contentions in this regard and found them without merit.

We submit further that petitioner's co-defendant, Reynold K. Hughes d/b/a Fayette Stock Farm, is an indispensable party to this action and that the petition for certiorari should be denied for the reason that petitioner

did not make him a party hereto. We suggest that since defendant and its co-defendant voluntarily, and not under execution, paid the judgment, interest and costs, that any further litigation should be confined to the two defendants and that respondent herein is only a nominal party as the proceeds of the judgment have been paid and dispersed and the matter ended insofar as this respondent is concerned.

Petitioner stated on Page 12 of its brief "This the Court of Appeals failed to do, saying merely that there was some substantial evidence contrary to defendant's contention on this point." No record citation is given and for obvious reasons. Actually, this is what the Court said: "In any event there is no substantial evidence showing an employment relationship between Hughes on the one hand and Guarr and Mitchell on the other to warrant submission of the question of sub-agency to the jury." (Op. p. 6a). It is clear from the testimony of the petitioner's District Manager that petitioner had sole and complete charge of the farm manager, Mr. Guarr. "Q. It is your contention, then Mr. Moffat—I don't know these things unless I ask you, and don't believe the jury knows—is it your contention that Mr. Guarr was the high mogul, you might say, or the man in charge of that farm? I mean by that as distinguished between Doane and Guarr, was Guarr the man there in charge?" "A. Mr. Hughes gives his instructions to us; we give ours to Mr. Guarr." (R. p. 75a).

Petitioner's co-defendant, Hughes, testified: "A. Well, partly that. If I saw something I would like changed I would come in and discuss it with Mr. Moffe t, not Mr. Guarr." (R. p. 38a). And further, "The Court: Well, when Doane took over, was it part of your understanding with Doane that these people who lived on the farm would be subject to his direction in the farming operation? Is that

what you are telling us?" "A. It was my understanding —I did not interfere—there was no understanding they would keep them or fire them or anything. That was left entirely to Doane." (R. p. 46a). And further, "Q. Did you maintain any control over him or any other employee since you left?" "A. No, sir." "Q. Did I understand you to say that when they took the contract over they could have fired the whole group, or retain some of them as they did Jimmy Mitchell?" "A. Yes, sir." (R. p. 48a).

II.

ARGUMENT.

The judgment of the Court of Appeals is correct and is not in conflict with any other decision so as to warrant review of the case by this Court.

III.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Lee Winchester, Sr., a member of the Bar of the Supreme Court of the United States of America, certify, in conformity with Rule 23 of that Court, that a copy of the foregoing Brief for the Respondent in Opposition to the petition for a writ of certiorari was served upon the petitioner, Doane Agricultural Service, Inc., and its co-defendant, Reynold K. Hughes, d/b/a Fayette Stock Farm, pursuant to Rule 33 of that Court by delivering the same at the office of counsel of record of each of them, to said counsel or to a clerk therein, this day of August, 1958.

Lee Winchester, Sr.,
Attorney for Respondent,
A. W. Coleman.